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In the

Supreme Court of the United States

OCTOBER TERM, 1981

No.

CONSTANCE KAMBEROS,
Petitioner,

v.

GTE AUTOMATIC ELECTRIC, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a Title VII claimant's back pay award can be eliminated for the time period in which the claimant relies upon the EEOC's investigation and conciliation processes and thus fails to file suit until those processes have run their lawful course?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Constance Kamberos, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this action on July 16, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 603 F.2d 598 (1979) and appears in Appendix A. The opinion rendered by the United States District Court for the Northern District of Illinois, Eastern Division, was not reported and appears in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1979. A timely petition for rehearing and suggestion for rehearing *en banc* was denied, over the dissent of the Chief Judge, on June 8, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

Section 2000e-5(e)-(g) (in pertinent part):

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . . .
>
> • • •
>
> (f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the

Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved.

• • •

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate."

STATEMENT OF THE CASE

On March 3, 1969, Petitioner, Constance Kamberos filed a sex discrimination charge with the Equal Employment Opportunity Commission as a result of her being denied the position of associate general counsel in the law department of Respondent, GTE Automatic Electric, Inc., on the basis of her sex. The charge was filed on the same day Petitioner was refused employment by Respondent solely on the basis of her sex.

The EEOC issued its determination of reasonable cause to believe Petitioner's charge as true on May 7, 1973. On January 3, 1974, Petitioner received a letter from the EEOC's district counsel informing her, for the first time, that the EEOC was unable to reach a conciliation agreement, that the EEOC would not commence an

action in federal court on her behalf, and that it was issuing her a right to sue letter.

On January 18, 1974, Petitioner filed a Complaint *pro se* against Respondent in the Federal District Court for the Northern District of Illinois. The case was ultimately tried beginning November 15, 1977. The district court found against Respondent on the issue of liability and granted Petitioner the following relief: (1) Respondent was ordered to pay Petitioner $119,117.20 in back pay covering the period from March 3, 1969 to July 31, 1978; (2) Respondent was mandatorily enjoined to employ Petitioner as a corporate attorney when the first vacancy occurred in that position; (3) Respondent was ordered to pay Petitioner $16,000.00 per annum front pay until Respondent offered Petitioner a position as corporate attorney; and (4) Respondent was ordered to pay $26,015.00 in attorneys' fees.

In an appeal taken by Respondent to the Seventh Circuit Court of Appeals, that court affirmed the district court's conclusion that Respondent discriminated against Petitioner because of her sex; however, it remanded for the district court to subtract the period from February 24, 1974 to July 31, 1978 from the back pay award, vacated the hiring order and front pay, and reduced the award of attorneys' fees. Only the issue regarding Petitioner's right to full back pay is raised in this Petition for certiorari. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc*[1] was denied on June 8, 1981.

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[1] *Amici Curiae* granted leave to file briefs in support of the Petition for Rehearing and Suggestion for Rehearing *En Banc* included the NAACP, Legal Defense And Educational Fund, Inc., the Lawyers' Committee for Civil Rights Under Law, the Women's Bar Association of Illinois and the EEOC.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With The Decisions Of This Court As To The Proper Interpretation And Application Of Title VII's Time Limitations And Back Pay Remedy.

The opinion of the Seventh Circuit Court of Appeals reducing Petitioner's back pay award directly conflicts with the Court's decisions in *Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977); *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 688 (1973) and *Albermarle Paper Co. v. Moody* 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). That conflict is evident at every step of analysis in applying the Seventh Circuit's belated and hybrid "laches" defense. First, the opinion ignores the clear line of authority coming from this Court interpreting Title VII's filing and time limitations. Petitioner complied with all of them. Second, the opinion stands the court approved and legislatively preferred administrative conciliation process on its head by forcing claimants to forego their administrative remedy through the EEOC in favor of an immediate action in federal court. Finally, the opinion undermines the "make whole" provisions of any back pay award by creating a hybrid laches defense totally at odds with traditional equity.

A. Under The Seventh Circuit's Reasoning, Petitioner's Strict Compliance With All Statutory Procedures Results In Her Being Unfairly Penalized.

There is no question that Petitioner acted within the strict time limitations set out in Title VII, Equal Employ-

ment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972), 42 U.S.C. Section 2000e *et seq.* (Supp. V 1975), *amending* Civil Rights Act of 1964, Title VII, 78 Stat. 253 (1964). Petitioner's prompt filing of her discrimination claim with the EEOC on the date of its occurrence complied with the 180 day requirement of Section 706(c), 42 U.S.C. Section 2000e-5(e) (Supp. V 1975). Petitioner's ultimate filing of her own action occurred in compliance with Section 706(f)(1), 42 U.S.C. Section 2000e-5(f)(1) (Supp. V 1975), more than 180 days after filing her charge with the EEOC and following the time period within which it investigated, determined and attempted to conciliate the charge. *EEOC v. Meyer Bros. Drug Co.*, 521 F.2d 1364, 1366 (8th Cir. 1975); *McAdams v. Thermal Industries, Inc.*, 428 F. Supp. 156, 160 (W.D. Pa. 1977). Finally, Petitioner filed suit in federal court within days of her simultaneous receipt of notification from the EEOC that conciliation efforts had failed and her right to sue letter, fully in compliance with Title VII's ninety day rule. Section 706(f), 42 U.S.C. Section 2000e-5(f)(1)(A).

The only statutory requirements imposed upon Petitioner, filing a timely charge with the EEOC and filing a complaint within 90 days of receipt of a right to sue letter, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S. Ct. 1011, 1019, 39 L. Ed. 2d 147, 157 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 93 S. Ct. 1817, 1822, 36 L. Ed. 2d 668, 675-76 (1973); were met. The Seventh Circuit's attempt to stampede claimants into filing private actions immediately after 180 days of filing a charge with the EEOC is wholly inconsistent with the administrative remedy provided in Title VII. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011,

39 L. Ed. 2d 147 (1974), alone demonstrates that Petitioner did not possess the right to sue letter which is the jurisdictional prerequisite to maintaining an action in federal court until January 3, 1974. The Seventh Circuit followed such ruling in *Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1238 (7th Cir. 1980), yet chose to ignore it here.

The Seventh Circuit's opinion, however, ignores Petitioner's timely compliance with the statute and mistakenly focuses upon the amount of time consumed in the EEOC's investigation and conciliation efforts. That sometimes lengthy conciliation process was considered by this Court in *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977).

> "In short, the literal language of Section 706(f)(1) simply cannot support a determination that it imposes a 180-day time limitation on EEOC enforcement suits. On the contrary, a natural reading of Section 706(f)(1) can lead only to the conclusion that it simply provides that a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC may himself bring a lawsuit, but that he must wait 180 days before doing so. *After waiting for that time period the complainant may either* file a private action within 90 days after EEOC notification *or continue to leave the ultimate resolution of his charge to the efforts of the EEOC.*"
> 432 U.S. 355, 361, 97 S. Ct. 2447, 2452, 53 L. Ed. 2d 402, 408 (emphasis added).

The Seventh Circuit's opinion destroys the option described by this Court by countering a claimant's decision to leave his charge with the EEOC with a consequent elimination of any back pay recovery for any "delay" in filing a private action following the required *minimum*

180 day investigation and conciliation period with the Commission. *Occidental Life* alone requires review of this dangerous precedent.

B. The Judicially Approved And Legislatively Preferred Administrative Investigation And Conciliation Process Of The EEOC Is Destroyed By The Seventh Circuit's Opinion.

The legislative history of Title VII and case law subsequently interpreting it clearly establishes administrative conciliation as the preferred means of resolving Title VII disputes. When Title VII was amended in 1972 to allow EEOC initiated suits, Congress reaffirmed suits by private individuals.

> "The retention of the private right of action, as amended . . . is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission . . . does not act with due diligence and speed. Accordingly, the provisions allow the person aggrieved to *elect* to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution. It is hoped that *recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC.*"
> S. Rep. No. 92-415, 92nd Cong., 1st Sess., p. 7168 (1971) (emphasis added).
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> • • •
>
> "*The committee recognizes that it will not be possible to render a decision in all cases within the time limits prescribed.* The complexity of many of the charges and the time required to develop the cases, is well recognized by the committee. *It is assumed that individual complainants* who are apprised of the need for the proper preparation of a complex complaint

> involving multiple issues and extensive discovery procedures, *would not cut short the administrative process merely to encounter the same kind of delays in a court proceeding.*"
> H.R. Rep. No. 92-238, 92 Cong., 1st Sess. (1972), 1972 U.S. Code Cong. & Admin. News, pp. 2147-48 (emphasis added).

Similarly, this Court has recognized "the federal policy requiring employment discrimination claims to be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in a federal court." *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 368, 97 S. Ct. 2447, 2455, 53 L. Ed. 2d 402, 412-13 (1977). The Seventh Circuit's opinion runs directly contrary to this policy. By denying back pay to claimants for any period exceeding the minimum 180 day EEOC conciliation period, future claimants are forced to immediately bring suit after 180 days in order to protect their entitlement to back pay, thereby overburdening the federal judiciary with premature claims and frustrating the legislative goal of administrative conciliation and disposition.

C. The Seventh Circuit's Reduction Of Petitioner's Back Pay Award Violates The "Make Whole" Provisions Of Title VII As Interpreted By This Court.

Title VII's back pay provision is designed to achieve equality of employment opportunities and to "make whole" the victims of unlawful discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-18, 95 S. Ct. 2362, 2370-72, 45 L. Ed. 2d 280, 296-97 (1975).

> "The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under

> that section of the act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only on the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 118 Cong. Rec. 7168 (1972)"
> 422 U.S. 405, 420, 95 S. Ct. 2362, 2373, 45 L. Ed. 2d 280, 298.

In essence, the Seventh Circuit's opinion not only does violence to this Court's clear pronouncement of the jurisdictional prerequisites, it substantially undercuts the "make whole" remedy of back pay when a claimant chooses the right of EEOC conciliation efforts. Under the Seventh Circuit's opinion, if a claimant chooses to rely on the administrative process and to let it run its lawful course, back pay will be denied for the entire period of investigation and conciliation following 180 days after the filing of the charge with the EEOC. Thus, the claimant is severely penalized for reliance upon the legislatively and judicially preferred mode of disposition.

II. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeal As To The Proper Interpretation And Application Of Title VII's Time Limitations And Back Pay Remedy.

In its opinion, the Seventh Circuit relied exclusively upon a Ninth Circuit decision as the rationale for its aberrant ruling that "the district court should have subtracted from the end of the back pay period an amount of time equivalent to the time between the expiration of the 180 day period and the date when the right to

sue letter was actually received by the plaintiff." *Kamberos v. GTE Automatic Electric, Inc.*, 603 F.2d 598, 603 (7th Cir. 1979). Such interpretation not only distorts the Ninth Circuit's opinion in *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282 (9th Cir. 1977), it also runs afoul of numerous holdings of other Courts of Appeal.

A. No Authority Exists Among Any Of The Circuits For The Seventh Circuit's Reduction Of Petitioner's Back Pay Award.

The Seventh Circuit's sole authority for reducing Petitioner's award of back pay was *Lynn v. Western Gillette, Inc.'s* ruling that "complainant should not be permitted to prejudice the employer by taking advantage of the [EEOC's] slowness in processing claims. . . . [p]articularly where the aggrieved party has consulted counsel and is aware of this right." 564 F.2d 1282, 1287. However, unlike the instant case, the plaintiff in *Western Gillette* had already received notice from the EEOC that conciliation efforts had failed, yet did not request her right to sue letter until 17 months later. Thus, she was aware that the EEOC was taking no further action in her case during the period of delay.

In the instant case, the period of "delay" which the Seventh Circuit found objectionable was the formal EEOC investigation and conciliation phase. Unlike in *Western Gillette,* Petitioner here had every reason to believe that EEOC investigation and conciliation were ongoing until the time she received simultaneous notification of the failure of conciliation and her right to sue letter. Upon receiving such notification and her right to sue letter, Petitioner filed suit well within 90 days, unlike the *Western Gillette* plaintiff who waited until 17 months after receiving notification of the failure of conciliation.

A Ninth Circuit case decided after *Western Gillette* clarifies the earlier opinion and completely undercuts the Seventh Circuit's reading of the case. *Boone v. Mechanical Specialties Co.*, 609 F.2d 956 (9th Cir. 1979), upheld the dismissal of plaintiff's Title VII complaint based on the defense of laches, making an important distinction between continuing administrative proceedings and "sleeping claims." As in *Western Gillette*, the *Boone* plaintiff was aware that the EEOC had unsuccessfully attempted to conciliate his claim because the EEOC frequently asked and he continually refused its offer of a right to sue letter. In holding that plaintiff had slept on his rights, the court indicated that plaintiff's suit would not have been barred if he had been relying upon ongoing administrative proceedings, 609 F. 2d 956, 960. Although *Boone* concerned a true laches defense rather than reduced back pay, (*i.e.*, a "hybrid" laches defense), the distinction between terminated and continuing conciliation efforts undercuts the Seventh Circuit's reliance on *Western Gillette* and makes Petitioner's reliance upon ongoing conciliation efforts reasonable. Thus, the Seventh Circuit's construction of a hybrid laches defense reducing back pay awards stands without precedent. On the contrary, those courts that have confronted similar questions have consistently rejected the Seventh Circuit's rationale.

B. The Issue Presented To The Seventh Circuit Has Been Consistently Determined To The Contrary By Other Circuits.

The Fifth Circuit in *Bernard v. Gulf Oil Co.*, 596 F.2d 1249 (1979), *aff'd on rehearing en banc*, 619 F.2d 459, 463 (5th Cir. 1980), and *Fowler v. Blue Bell, Inc.*, 596 F. 2d 1276 (5th Cir. 1979), considered a laches defense, holding that plaintiffs were not barred from bringing

suit because both were involved in continuing administrative procedures. In *Fowler,* Plaintiff's claim was pending with the EEOC for approximately five years when he ultimately received his right to sue letter. The Fifth Circuit found even this delay was reasonable in that plaintiff was entitled to await completion of conciliation efforts before filing suit—these efforts being completed upon receipt of *either* the right to sue letter or by notification that the EEOC did not find reasonable cause to pursue the claim. 596 F.2d 1276, 1279.

Bernard addressed a similar issue in a class action context, where nine years had elapsed between the filing of a charge with the EEOC and the issuance of the right to sue letters.

> "The issue before us, therefore, is whether plaintiffs' failure to file a private action until after the termination of the EEOC's active, continuing administrative process is unreasonable.
>
> "The Supreme Court in *Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977), discussed a similar issue. . . . A legislative analysis of the 1972 amendments to Title VII is similar.
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> • • •
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> These statements clearly indicate that the private remedy allowed by 42 U.S.C. § 2000e-5(f)(1) is only an alternative method for a plaintiff to obtain relief from discrimination. *A plaintiff cannot be penalized for choosing to forgo this alternative and electing instead the legislatively and judicially favored method of relying on the administrative processes of the EEOC.* [footnote omitted] We therefore hold that plaintiffs' *failure to file their Title VII claim until completion of the EEOC process was not inexcusable delay* and could not support the application of laches."
>
> 596 F.2d 1249, 1956-57 (5th Cir. 1979) (emphasis added)

See also: Whitehead v. Reliance Insurance Co., 632 F.2d 452, 456 (5th Cir. 1980) (cannot penalize plaintiff for choosing to stay with legislatively and judicially favored administrative process); *Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301, 1310 (8th Cir. 1975) (undisputed that plaintiff relied on EEOC procedures, therefore should not be penalized for its errors); *McAdams v. Thermal Industries Inc.*, 428 F. Supp. 156, 160 (W.D. Pa. 1977) (180 day period does not create fixed time limitation beyond which can no longer rely upon administrative process without forfeiting remedy); *EEOC v. E.I. duPont de Nemours & Co.*, 516 F.2d 1297, 1300 (3rd Cir. 1975) (private party has choice of own action or can rely upon representation of the EEOC); *Antonopulos v. Aerojet-General Corp.*, 295 F. Supp. 1390, 1396 (E.D. Cal. 1968) (could have brought suit before failure of conciliation but should not be penalized for giving Commission extra time to accomplish voluntary settlement); *Mondy v. Crown Zellerbach Corp.*, 271 F. Supp. 258, 263 (E.D. La. 1967) (statute requires filing charge and receiving right to sue, with plaintiff not responsible for EEOC's failure to conciliate); *Sangster v. United Air Lines, Inc.*, 438 F. Supp. 1221, 1228 (N.D. Cal. 1977) (EEOC's conciliation efforts, regardless of time taken, are designed to effect remedy and delay not to be visited on plaintiff); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 361 (7th Cir. 1968) (complainant should not be made to suffer innocently for administrative delays for which he is not responsible); *Harris v. Ford Motor Co.*, 487 F. Supp. 429, 432 (W.D. Mo. 1980) (EEOC's delay in notifying of right to sue should not penalize plaintiff). The plethora of case law rejecting laches as applicable to the period of administrative investigation and conciliation is par-

ticularly applicable here, where the Seventh Circuit fashioned a hybrid of the traditional laches defense, not to bar Petitioner's complaint but to substantially reduce her back pay remedy.

C. The Hybrid Laches Defense Created By The Seventh Circuit Has No Foundation In Law Or In Fact.

A traditional laches defense will result in the dismissal of a plaintiff's claim once the defendant has demonstrated that the plaintiff unreasonably delayed asserting his claim *and* that the defendant was prejudiced by the delay. *EEOC v. Massey-Ferguson, Inc.*, 622 F.2d 271 (7th Cir. 1980). In the instant case, Respondent did not plead the defense of laches, yet the court reduced Petitioner's back pay award, citing an unreasonable delay by the Petitioner in bringing suit. In effect, the court applied only one prong of the two-pronged laches test without considering whether the Respondent met its burden of proving prejudice. Granted, a true laches defense bars a plaintiff's entire claim. However, the laches hybrid applied by the court in the instant case effectively penalized Petitioner for a delay in bringing suit and, in effect, applies laches to a portion of Petitioner's back pay remedy without a showing of prejudice by Respondent.

In *Occidental Life Insurance Co. v. EEOC*, this Court recognized the equitable power of the federal courts to restrict back pay in appropriate instances. However, such restriction can only be applied if Respondent has been prejudiced by delay and if the delay occurs after completion of conciliation efforts:

> "It is, of course, possible that despite those procedural protections a defendant in a Title VII enforcement action might still be significantly handi-

> capped in making his defense because of an inordinate EEOC delay in filing the action *after* exhausting its conciliation efforts. If such cases arise the federal courts do not lack the power to provide relief. . . . [W]hen a Title VII defendant *is in fact prejudiced* by a private plaintiff's unexcused conduct in a particular case, the trial court may restrict or even deny back pay relief."
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> *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 373, 97 S. Ct. 2447, 2458, 53 L. Ed. 2d 402, 415, (1977) (emphasis added).

Thus, while the court may use its equitable powers to reduce back pay, both prongs of a laches defense must still be met by Respondent before the court can make an adjustment. In the instant case, laches, or alternatively, simply delay and prejudice, were neither pleaded nor proved by Respondent. Thus, under *Occidental*, reduction of back pay was improper.

In addition, back pay should generally be awarded to a prevailing plaintiff:

> "It follows that, given a finding of unlawful discrimination, back pay should be denied only for reasons which, *if applied generally*, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeal must maintain a consistent and principled application of the back pay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases."
>
> *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421-22, 95 S. Ct. 2362, 2373, 45 L. Ed. 280, 298-99 (1975) (emphasis added).

Therefore, because Petitioner prevailed on her sex discrimination claim, she should not be denied back pay if to do so would frustrate the goal of making a prevailing plaintiff whole. Further, the appellate court ignored the Supreme Court's observation that the trial court will often have a better grasp of the facts in a particular case. Thus, because Respondent did not meet its burden of demonstrating delay and prejudice and because back pay should be awarded to a prevailing plaintiff, the Seventh Circuit had no basis in fact or in law to reduce Petitioner's back pay award.

In *Harris v. Ford Motor Co.*, 487 F. Supp. 429 (W.D. Mo. 1980), the court found that a five year delay in bringing suit did not bar a plaintiff's claim because the EEOC did not act with diligence in issuing the plaintiff her right to sue letter. Importantly, the defendant argued that because of this delay, the defendant would be liable for two additional years of back pay. However, the court observed:

> "The Court understands that this may cause hardship on the defendant, but it is the policy of the courts to encourage back pay awards and to construe Title VII liberally in order to make the plaintiff "whole." [citation omitted]. Unless the conduct of the plaintiff precludes an award of back pay, the Court may not arbitrarily deny it."
> 487 F. Supp. 429, 432.

Thus, the court found that laches could not bar the plaintiff's claim, and further noted that the court could not restrict plaintiff's back pay award on remand because delay was the fault of the EEOC rather than the plaintiff.

Most illustrative in the present context is *Sangster v. United Air Lines, Inc.*, 438 F. Supp. 1221 (N.D. Cal.

1977). There the court found that the plaintiff "did not pursue her remedy with much vigor" and that plaintiff's "complacency in the face of an extraordinary passage of time is at least partly responsible for [the case's] duration." However, the court held:

> "But to take either of these facts as sufficient cause to reduce her remedy would be to state a rule which, 'if applied generally, would . . . frustrate the central statutory purposes of eradicating discrimination through the economy and making persons whole for injuries suffered through past discrimination' [citation omitted] . . . [I]f a portion of the relief otherwise due is to be denied because the person aggrieved fails to seek his remedy with adequate industry . . . where a chief cause of the delay is reliance on the proper and preferred process, then employers would obtain protection for persistence in unlawful action, and reliance on the Act would itself be found a buttress of economic discrimination."
> 438 F. Supp. 1221, 1230.

Thus, the court held that it would be contrary to the purposes of Title VII to reduce a plaintiff's back pay remedy because of a lengthy delay before filing suit where such delay is no fault of plaintiff.

Ultimately, the Seventh Circuit failed to meet even its own standard for proving laches in a Title VII action.

> "Recourse to the doctrine of laches is appropriate only if the Commission has 'unduly,' 'inexcusably,' 'unreasonably,' or 'inordinately' delayed in asserting a claim and that delay has 'substantially,' 'materially' or 'seriously' prejudiced the defendant's ability to conduct its defense."
> *EEOC v. Massey-Ferguson, Inc.*, 622 F.2d 271, 275 (7th Cir. 1980).

Thus, in applying laches to a severable portion of Petitioner's back pay claim, the Seventh Circuit neither articulated nor met its own standard. First, Petitioner neither "inexcusably" nor "unreasonably" delayed in filing suit as she was relying upon the legislatively and judicially favored administrative process. Second, neither a substantial nor material prejudice to Respondent occurred as a result of the delay.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

PETER B. CAREY
TIMOTHY J. MCGONEGLE
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September 4, 1981

APPENDIX A

No. 79-1185

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

CONSTANCE KAMBEROS,

Plaintiff-Appellee,

v.

GTE AUTOMATIC ELECTRIC, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74-C-151

PRENTICE H. MARSHALL, *Judge.*

Argued June 8, 1979

Decided July 16, 1979

Before SWYGERT, PELL and BAUER, *Circuit Judges.*

SWYGERT, *Circuit Judge.*

This is a suit for damages and injunctive relief brought under the provisions of the Equal Opportunity and Employment Act, 42 U.S.C. §§ 2000 *et seq.* Plaintiff Comstance Kamberos alleged that defendant GTE Automatic Electric, Inc. ("GTE") had engaged in discriminatory hiring practices based on sex. After a bench trial, the district court found against defendant on the issue of liability. Plaintiff was granted relief:

(1) Defendant was ordered to pay plaintiff $119,117.20 in backpay covering the period from March 3, 1969 to July 31, 1978.

(2) Defendant was mandatorily enjoined to employ plaintiff as a corporate attorney when the first vacancy occurs in that position.

(3) Defendant was ordered to pay plaintiff $16,000.00 per annum front pay until defendant offers plaintiff a position as corporate attorney.

(4) Defendant was ordered to pay $26,015.00 in attorney fees.

Kamberos v. GTE Automatic Elec., Inc., No. 74 C 151 (N.D. Ill. Aug. 10, 1978).

The defendant appeals from the finding of liability, the appropriateness and computation of the backpay award, the hiring injunction, and the amount of attorney's fees awarded. We affirm the district court's finding of liability, but reverse on the appropriateness of the hiring injunction and the computation of the awards of backpay and attorney's fees.

This controversy began over ten years ago in March 1969. At that time Kamberos, a graduate of the DePaul University Law School in Chicago, was unemployed and registered with the Illinois State Employment Service. GTE was seeking a corporate attorney to fill a position opened by a resignation in June 1968. In August 1968 William McGuire, vice-president of GTE's operation in Northlake, wrote to the deans of the law schools at DePaul, Northwestern and Loyola Universities, and the placement service of the Chicago Bar Association. McGuire's letter indicated that GTE was seeking an associate general attorney:

> We would require a man with a real interest in this kind of work and a record of excellent scholarship, with qualities of initiative and imagination, to work in a broad field of corporate legal activity, except trial work. While we would like to have a man who has two or three years actual experience, either in a law firm or corporation, we would consider candidates with less or more qualifications than these.
>
> • • •

I can assure you that this is a challenging and worthwhile opportunity for the right man. (Plaintiff's Exhibit 35.)

When efforts to find the "right man" did not produce a candidate, GTE advertised in the *Wall Street Journal* on March 3, 1969. The advertisement read in pertinent part:

Automatic Electric Company, the largest manufacturer and supplier in the United States of telephone equipment for the independent telephone industry, has an exceptional opportunity in its law department for an attorney with three to five years' experience.

The position involves legal work concerning all areas of the company's activities.

A high academic record and experience in a private law firm or corporate law department is desired.

The salary is competitive and will be based upon the individual's experience and achievement.

Please forward resume and salary requirements, which will be treated in confidence, to:

Bruce Bullock
Professional Employment
AUTOMATIC ELECTRIC
A Member Of The GT&E Family Of Companies
400 North Wolf Road, Northlake, Illinois
An Equal Opportunity Employer.
(Plaintiff's Exhibit 18.)

The day the advertisment appeared, Kamberos was meeting with Carmen Matello, a counselor with the Illinois State Employment Service. Matello asked Kamberos if she was interested in GTE's offer and she responded affirmatively. Matello telephoned Bruce Bullock at defendant's offices and stated that he had an attorney with him who met the qualifications described in the ad-

vertisement.[1] Matello read Kamberos' resume to Bullock. Kamberos was seated next to Matello and could overhear the conversation. She testified that when Batello finished reading her resume, Bullock responded, "That's exactly the background we're looking for." Bullock and Matello then arranged for an interview that afternoon. Bullock requested the name of the lawyer and when Matello complied, Bullock asked, "Is it a woman?" Matello responded, "Yes." Bullock then stated that GTE was not interested in hiring a woman: "they were looking for a man." In response, Matello stated, "She has all of the qualifications." Bullock replied that he would not hire her because the job involved working more than eight hours a day.[2] When Matello stated that the Eight-Hour Law did not apply to professionals, Bullock's response was, "We are not interested in a woman."

Kamberos then spoke directly to Bullock on the telephone. Bullock again stated that the Eight-Hour Law precluded her from being considered for the position. At that point, Kamberos reiterated Matello's statement that the law did not apply to professionals. According to plaintiff, Bullock then ". . . kind of laughed" and said ". . . they would not hire a woman for this job."

Kamberos filed a charge with the Equal Employment Opportunity Commission ("EEOC") that same day. On

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[1] Bullock, to whom the advertisement directed inquiries, had been an employment recruiter for a number of years and for at least one year had engaged in professional recruiting. Bullock and his colleagues had been responsible for processing thousands of applications for jobs at GTE. Kamberos satisfied the qualifications. She was a graduate of an accredited law school and had more than five years of experience in corporate and private law offices.

[2] "An Act Concerning the Hours of Employment of Females in Certain Occupations," Ill. Ann. Stat. ch. 48 §§ 5 *et seq.*, ("Eight-Hour Law") prevented women from working more than an eight-hour day. The law was amended prior to these events to exclude professionals from the restrictions.

March 27, 1969 an EEOC investigator met with M.A. Edelman, defendant's director of personnel, and served Kamberos' complaint upon defendant. The following day Edelman prepared a letter to Kamberos, apologizing for the misunderstanding and asking her to submit a resume. Edelman wrote to the EEOC on April 2 attaching a copy of his letter to Kamberos and reaffirming GTE's position that the incident was caused by a misunderstanding of the Eight-Hour Law. Kamberos testified that she never received the letter and that the first time she saw the letter was in 1973 when she asked the EEOC to attempt to conciliate her dispute with GTE.

Neither the EEOC nor Kamberos took any action on her complaint for over four years.[3] On January 3, 1974 the EEOC issued a "right to sue" letter and plaintiff filed her complaint in the Northern District of Illinois on January 18, 1974.

I

The appropriate legal standard outlining the burden of proof which a Title VII plaintiff must meet was established by the Supreme Court in *McDonnel Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See also Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *Board of Trustees of the Keene State College v. Sweeney*, 47 U.S.L.W. 3330 (Nov. 13, 1978).

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that [s]he belongs to [that sex discriminated against]; (ii) that [s]he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite h[er] quali-

[3] The history of the action in the district court is almost as distressing as the EEOC delay. The case was assigned to three different judges before being heard by Judge Marshall over three years after the complaint had been filed in the district court.

> fications, [s]he was rejected; and (iv) that, after h[er] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *McDonnel, supra,* 411 U.S. at 802.

"The burden must then shift to the employer to articulate some legitimate, non-discriminatory reason for the employer's rejection [of the plaintiff]." *Id.* If the employer does offer some legitimate reason for the rejection, the plaintiff must then be "afforded a fair opportunity to show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext." *Id.* at 804.

Examining the evidence in light of these standards, Kamberos satisfied the requirements for a *prima facie* showing of sexual discrimination.[4] The district court found that she was a woman qualified for the position of corporate attorney with GTE, that she was rejected by GTE, and that the position was subsequently filled by a male. GTE's articulated, non-discriminatory reason for its action was that Bullock's refusal to hire Kamberos was an innocently mistaken application of the Eight-Hour Law. In determining that GTE's stated reason was pretextual, the district court correctly applied the *McDonnel* standard. In reviewing the district court's decision, we are bound to accept its findings of fact unless they are clearly erroneous. *Stewart v. General Motors Corp,* 542 F.2d 445, 449 (7th Cir. 1976), *cert. denied,* 433 U.S. 919 (1977). The district court's finding that GTE's stated reason was pretextual is supported by the evidence. It is unlikely that Bullock was unaware of the amendment to the Eight-Hour Law which had occurred two years earlier

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[4] Although Kamberos never technically applied for the job at GTE, the district court held that the telephone call between Matello/Kamberos and Bullock constituted an application or, alternatively, a technical application is not necessary when defendant's conduct effectively prevented plaintiff from applying. We agree.

considering the large volume of professional applications he handled. Furthermore, Bullock ignored Matello's and Kamberos' protestations that the law did not apply. The argument of a mistaken interpretation of the Eight-Hour Law can be seen only as pretextual in these circumstances. The district court's conclusion that GTE's justification for rejecting Kamberos was pretextual and that GTE discriminated against Kamberos because of her sex must be affirmed.

II

The purpose of 42 U.S.C. §§ 2000 *et seq.* is to achieve equality of employment opportunity and to make persons whole for injuries suffered on account of unlawful employment discrimination. *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). "It follows that given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes." *Id.* at 421. GTE, relying on *Taylor v. Phillips Industries, Inc.*, 593 F.2d 1283 (7th Cir. 1979), argues that "before the court may award damages, plaintiff must first establish that she has, in fact, sustained an economic loss from defendant's discrimination." *Id.* at 786-87.[5] GTE contends that in order for Kamberos to be eligible for backpay she must prove that she would have been hired, as this would be the only way she could establish an actual economic loss. Defendant, in effect, is attempting to reargue the liability

[5] GTE also argues that Kamberos is not eligible for backpay because she was not the best qualified applicant for the position. *Rogers v. EEOC*, 551 F.2d 456, 457 (1977). This rule only applies, however, when competing applicants are considered contemporaneously and the discrimination was only a factor in rejecting the plaintiff. In this case Thomas A. Chilcott, who eventually filled the position and whom GTE argues is better qualified than Kamberos, had not yet applied when Kamberos was rejected. Thus her gender was the *only* reason for her rejection.

issue. The *McDonnel* decision demonstrates that plaintiff's burden is met when she shows that she was qualified, not that she would have been hired.

The *Taylor* decision, relied on by GTE, applies only when a plaintiff fails to show that her post-discrimination earnings were less than her earnings would have been had she been hired. *See* 42 U.S.C. § 2000e-5(g). Thus, the plaintiff in *Taylor* failed to establish an economic loss. Kamberos has established her damages by measuring the difference between her actual earnings and those which she would have earned absent the discrimination of defendant. *Kamberos v. GTE Automatic Elec., Inc.*, No. 74 C 151, slip op. at 23 (N.D. Ill., Aug. 10, 1978). *See Waters* v. *Wisconsin Steel Workers of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1975).[6]

The court did overlook one factor in computing the amount of backpay. Regulations passed pursuant to 42 U.S.C. §§ 2000e *et seq.* provide that an aggrieved party may request a right to sue letter any time after 180 days following the filing of a charge with the EEOC.[7] 29 C.F.R. § 1601-28 (1978). In *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282, 1287 (9th Cir. 1977), the Ninth Circuit stated

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[6] GTE also argues that it would be highly speculative to credit Kamberos with the salary increases actually earned by Chilcott in determining what she would have earned. The short answer is that "uncertainty in determining what an employee would have earned . . . should be resolved against the discriminating employer." *United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1050 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976).

[7] 29 C.F.R. § 1601.28(a) reads:

> Notice of right to sue: Procedure and authority
>
> Issuance of notice of right to sue upon request (1) when a person claiming to be aggrieved requests in writing, that a notice of right to sue be issued . . . the Commission shall promptly issue such notice . . . at any time after the expiration of one hundred eighty (180) days after the filing of the charge.

that the "complainant should not be permitted to prejudice the employer by taking advantage of the [EEOC's] slowness in processing claims, . . . [p]articularly where the aggrieved party has consulted counsel and is aware of this right." In this case Kamberos not only retained counsel but is a lawyer herself. Nevertheless, she permitted her complaint to lie dormant with the EEOC for over four years, despite the fact that EEOC regulations provide for the automatic issuance of the right to sue letter upon request of the complainant any time 180 days after the filing of the complaint with the EEOC. Under these circumstances the district court should have subtracted from the end of the backpay period an amount of time equivalent to the time between the expiration of the 180 day period and the date when the right to sue letter was actually received by the plaintiff. On remand the court should subtract the period from February 24, 1974 to July 31, 1978 from the backpay award.[8]

III

A hiring order is not appropriate unless the person discriminated against is presently qualified to assume the position sought. *Franks v. Bowman Construction Co., Inc.*, 424 U.S. 747, 772 n. 31 (1976). Because Kamberos is no longer qualified to assume the position of corporate attorney with GTE, the hiring order must be vacated. Kamberos has not been employed as an attorney since 1973 and has not had any significant corporate law experience since 1960. The field of corporate law is not static and has changed significantly since 1960. A determination of whether injunctive relief is appropriate hinges on a balance of the various equities between the parties and the result must be consistent

[8] The complaint with the EEOC was filed March 3, 1969. August 30 is 180 days after March 3 and January 3, 1974 is the day the right to sue letter was actually received by Kamberos. The period from February 24, 1974 to July 31. 1978 is equivalent to the period from August 30, 1969 to January 3, 1974.

with the purposes of Title VII and the "fundamental concepts of fairness." *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974). Guided by this standard, we believe the injunctive relief granted below was inappropriate. The award of front pay in the instant case was a contingency of the hiring order and must be vacated with the injunction.

IV

The proper method of determining the amount of attorney fees to be awarded in a Title VII action was set out by this court in *Waters* v. *Wisconsin Steel Workers of International Harvester Co., supra,* 502 F.2d at 1309. The most convenient starting point is hours worked times billing rate and other elements to be considered are set out in the Code of Professional Responsibility as adopted by the American Bar Association.*

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*As suggested in the Code of Professional Responsibility:

> Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to present the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent.
>
> Disciplinary Rule 2-106.

In this case plaintiff's attorney and his associates were compensated by the district court at a rate fifty percent in excess of their normal hourly rates. In awarding this premium, the district court recognized the contingent nature of the fees and noted that counsels' representation had been efficient and vigorous. Applying the factors outlined in Disciplinary Rule 2-106, ABA Code of Professional Responsibility as required by *Waters, supra,* 502 F.2d 1309, however, leads us to the conclusion that the award of attorney fees is excessive.

Plaintiff's counsel spent 268.04 hours on this case, but this time was spread out over a six-year period. Although the factual issues were complex, the legal issues were "relatively simple and few." *See Beazer v. New York Transit Authority,* 558 F.2d 97 (2d Cir. 1977), *rev'd on other grounds,* 47 U.S.L.W. 4291 (March 21, 1979). The district court did not find that Kamberos' attorneys were precluded from accepting other employment, nor were they operating under time limitations. Further, the award of backpay will be reduced and the hiring injunction vacated on remand; thus, the "results" obtained by the attorneys are less than the results upon which the district court originally determined the appropriate fees.

Although the district court found that counsels' representation was commendable and the fees contingent in nature, these two factors alone do not warrant an award fifty percent in excess of normal hourly rates. We consider a rate of twenty-five percent in excess of normal charges to be proper under the circumstances of this case.

Accordingly, the district court's decision is affirmed in part and reversed in part. The cause is remanded with directions to modify the remedy consistent with this opinion.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 8, 1981

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

ON PETITION FOR REHEARING

No. 79-1185

CONSTANCE KAMBEROS,

Plaintiff-Appellee,

v.

GTE AUTOMATIC ELECTRIC, INC.,

Defendant-Appellant.

ORDER

On consideration of the petition for rehearing and suggestions for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellee, a vote of the active members of the court was requested, and a majority of the active members of the court have voted to deny a rehearing *en banc*. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Chief Judge Thomas E. Fairchild voted to grant the petition for rehearing *en banc* limited to the issues raised by appellee and the amici.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

CONSTANCE KAMBEROS,

Plaintiff,

v.

GTE AUTOMATIC ELECTRIC, INCORPORATED,

Defendant.

No. 74 C 151

MEMORANDUM DECISION

This is an action brought by plaintiff Constance Kamberos against defendant GTE Automatic Electric, Incorporated under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1970). Plaintiff is a lawyer. She alleges that defendant discriminated against her because of her sex when on March 3, 1969 it refused to consider her for the position of corporate attorney with its law department in Northlake, Illinois. Following a bench trial, we orally announced our findings of fact and conclusions of law in favor of the plaintiff and against the defendant on the issue of liability. We directed counsel to submit supplemental memoranda on the subjects of appropriate relief and attorney's fees. The memoranda have now been filed and we have carefully considered them. Before turning to the subjects which they address we think it advisable to restate the facts as we have found them. This memorandum will stand as our formal findings of fact and conclusions of law pursuant to Rule 52(a), F.R.Civ.P.

Because defendant has made much of plaintiff's alleged lack of qualifications for the position of corporate attorney we begin this memorandum with a recital of plaintiff's background and experience up to the date of defendant's unlawful discrimination against plaintiff.

Constance Kamberos was born in 1926 as one of five children (three sisters and a brother) of Greek immigrant parents. In 1936 her father deserted the family. Her mother was non-English speaking and unemployable. There were no welfare programs in those days and the Kamberos children went to work to sustain the family.

Miss Kamberos worked throughout her high school days. In 1944 she graduated from Calumet High School in Chicago. She was elected to the National Honor Society. At the end of her second year of high school, she was accepted as a student at the University of Chicago in its advanced enrollment program. She was awarded a scholarship. However, she was unable to accept that opportunity because her family could not financially afford it.

Upon graduation from high school, she was awarded a scholarship to the University of Illinois in Urbana. Again, she was forced to decline that opportunity for financial reasons.

Instead she enrolled in Wilson Junior College in Chicago. Throughout her junior college career she was employed full-time in a secretarial and editorial position with the University of Chicago Press, one of the leading publishers of scholarly works in this city.

She graduated from Wilson Junior College in June, 1946. That fall she matriculated as a freshman in the College of Law of DePaul University. There were 200 students in her freshman class which was comprised largely of returning war veterans. There were only three women in the class. At the end of the first year only 100 students survived the rigors of legal education and Miss Kamberos was the only woman.

Throughout her law school career she worked as a secretary for Bjorksten Research Laboratory, the offices of which were on Lake Street immediately across the street from the then campus of DePaul Law School. She worked five or six hours a day and all day Saturday. Despite this virtually full-time work schedule, Miss Kamberos finished law school in two and one half years. She received her L.L.B. on February 15, 1948.

During her last semester in law school in addition to her employment and law school curriculum she took a bar review course to prepare for the Illinois state bar examination. She took the bar examination about 30 days after she graduated from law school, passed it and was sworn in as a member of the bar of the Supreme Court of Illinois on May 16, 1949. She promptly sought and obtained admission to the bar of this court on September 21, 1949 and on April 6, 1953 was admitted to the bar of the Supreme Court of the United States.

Upon graduation from law school she could not immediately find a paying professional position. Bent upon being a lawyer, she took an uncompensated position with a real estate broker who permitted her to close real estate transactions for him. She kept that job for about 90 days and then was offered employment by Nathan Einhorn, Esq., a member of the Illinois bar. She remained with Mr. Einhorn for approximately five years doing both secretarial and legal work. Mr. Einhorn testified in her behalf that her work for him was competent and diligent. Her starting salary was $40 per week; when she left Mr. Einhorn in 1955 her compensation was $100 a week.

In 1955 a first-rate opportunity was presented to Miss Kamberos. Johan Bjorksten for whom she had worked during her law school days had moved his research laboratories to Madison, Wisconsin. He was in need of in-house counsel. He offered the position to Miss Kamberos and she accepted it. Shortly after she arrived in Madison she was admitted to the bar of the Supreme Court of Wisconson.

Bjorksten Laboratories was heavily engaged in research in chemistry and physics. It did a great deal of government work. Miss Kamberos handled all of its legal affairs. Particularly she prepared and administered a number of contract bids and awards with the United States Government. She handled all of the corporate minutes and resolutions. In 1958 Bjorksten undertook a major study in Europe in connection with the then infant European Common Market. Miss Kamberos spent a good part of that year in Europe studying the Common Market, organizing a subsidiary corporation in Switzerland and in Mr. Bjorksten's words "rendering us great service."

Mr. Bjorksten testified in plaintiff's behalf. He said that she was diligent, loyal, honest and competent. He regretted the loss of her services when in 1960 as a result of a grievous illness in her family, she was obliged to leave Madison and return to Chicago.

Upon her return to Chicago, she was employed as a lawyer by the National Association of Real Estate Boards. Her primary responsibility was operating the Board's legislative clearing house in which she reviewed legislation throughout the country and summarized and commented upon it in a publication she produced for the Board. In December, 1961, the National Association decided to discontinue the legislative clearing house activity. Accordingly, Miss Kamberos was terminated. At that time, however, Eugene P. Conser, Executive Vice President of the National Association, assured her "that at no time was there any criticism of the manner in which [the legislative clearing house] had been conducted, nor of your personal services . . . your services [have] been eminently satisfactory." PX 12.

Miss Kamberos was unable immediately to find a position as a lawyer. Consequently, she registered with the Tucker Employment Agency from which she did secretarial work for a number of law firms in Chicago. Frequently, she was called upon to do lawyer work.

In 1963 she was employed by the Chicago Bar Association to investigate professional grievances and present them to the Association's grievance committee. She remained there for a year at the end of which the Association reorganized its grievance procedures and her services were no longer needed.

Again she had difficulty finding a lawyer's position. Consequently she returned to the Tucker Employment Agency and again for a period of some eighteen months did secretarial work at a variety of law firms in Chicago. Again she was called upon from time to time to perform lawyer services.

In 1966 she was employed by the legal department of Allstate Insurance Company and she remained there for two years. There she did trial work in the Circuit Court of Cook County in the area of property damage and subrogation claims. One of her exhibits (PX 14) shows that in August, 1967 she had the highest production rate of all of the lawyers in a staff of fourteen. In 1968 as a result of a disagreement with her superiors she was terminated. She commenced a civil action against Allstate Insurance Company as a result of that termination which concluded in a judgment in favor of defendant Allstate.

Thereafter she was employed by the Chicago firm of Julius and Theodore Sherwin. When she took that position she was told it would be temporary in view of the fact the eldest son of one of the Sherwins was in law school and expected to join the firm upon his graduation. That did eventuate with the result that her services were no longer needed by the Sherwins and she was terminated. During the time she was with them she did corporate work and engaged in litigation. There is no suggestion that her termination by the Sherwins was for any reason other than that told to her at the time she took the position.

During the first few months of 1969 Miss Kamberos diligently looked for a position as a lawyer. Included in

her efforts was an enrollment with the Illinois State Employment Service which provides employment counseling for unemployed residents of Illinois. On March 3, 1969 she had a meeting with Mr. Carmen Metallo, a counselor with the Service. It was as a result of that meeting that Miss Kamberos sought employment with defendant GTE Automatic Electric. Before recounting the details of her contact with GTE, we turn to its need for a lawyer.

In 1964 Mr. D. J. Demarco was employed as a corporate lawyer by GTE Automatic. Mr. Demarco had just graduated from DePaul University School of Law. He remained with GTE Automatic until June, 1968 when he resigned for another position. Nothing in the record suggests that Demarco did not satisfactorily fill the requirements of the position which he held with GTE.

In August of 1968 William M. McGuire, vice president, general counsel and general commercial manager of GTE Automatic's operation in Northlake wrote to the deans of the law schools at DePaul, Northwestern and Loyola University and the placement service of the Chicago Bar Association making known a "position of associate general attorney to fill a vacancy in our law department." The letter went on:

> "We would require a man with a real interest in this kind of work and a record of excellent scholarship, with qualities of initiative and imagination, to work in a broad field of corporate legal activity, except trial work. While we would like to have a man who has two or three years actual experience, either in a law firm or corporation, we would consider candidates with less or more qualifications than these.
>
> • • •
>
> "I can assure you that this is a challenging and worthwhile opportunity for the right man . . ." (PX 35).

Mr. McGuire's efforts to find the "right man" did not produce a candidate. Accordingly, on March 3, 1969, GTE Automatic advertised in the Wall Street Journal for a corporate attorney. The advertisement read in material part:

> "Automatic Electric Company, the largest manufacturer and supplier in the United States of telephone equipment for the independent telephone industry, has an exceptional opportunity in its law department for an attorney with three to five years' experience.
>
> "The position involves legal work concerning all areas of the company's activities.
>
> "A high academic record and experience in a private law firm or corporate law department is desired.
>
> "The salary is competitive and will be based upon the individual's experience and achievement.
>
> "Please forward resume and salary requirements, which will be treated in confidence, to:
>
> Bruce Bullock
> Professional Employment
> AUTOMATIC ELECTRIC
> A Member Of The GT&E Family Of Companies
> 400 North Wolf Road, Northlake, Illinois
> An Equal Opportunity Employer." (PX 18)

Defendant's witnesses testified that the advertisement in the Wall Street Journal was placed as the result of a job requisition initiated by McGuire. Defendant was unable to produce that job requisition.

Bullock, to whom the advertisement directed inquiries, was a college graduate. He had done employment recruiting for a number of years. For at least one year he had engaged in professional recruiting for defendant. Engineers on defendant's staff are included as professionals. In his capacity as a professional Bullock and his colleagues had been responsible for processing literally thousands of applications. (DX 4).

On March 3, 1969 when Miss Kamberos went to see Mr. Metallo at the Illinois State Employment Service, he asked her if she had seen defendant's advertisement in the Wall Street Journal. She replied that she had not. Metallo showed it to her and asked if she was interested. She responded in the affirmative.

Metallo then called Bullock at defendant's offices. He introduced himself and told Bullock that he had an attorney with him who met the qualifications described in defendant's advertisement. Miss Kamberos had provided Metallo with her resume and he began reading it slowly to Bullock. He read her employment history, her educational background, provided dates, spelled names; in short he transmitted the entire resume by telephone.

Miss Kamberos was seated next to Metallo so that she could overhear the conversation. She testified that Bullock responded on Metallo's reading of the resume, "That's exactly the background we're looking for." Bullock asked if an interview could be set up that afternoon. Metallo inquired of Miss Kamberos and she responded affirmatively. Bullock then asked the name of the lawyer. Metallo said the last name was Kamberos and the first name Constance. At that point Bullock asked, "Is it a woman?" Metallo responded, "Yes."

Bullock then stated that they were not interested in a woman, they were looking for a man for the job. Metallo stated, "She has all of the qualifications." Bullock replied that he wouldn't hire her because the job involved working more than eight hours a day. Metallo responded that the Illinois 8-hour day law did not apply to professionals. Bullock's response was, "We are not interested in a woman."

At that point Miss Kamberos having overheard Bullock's statements asked if she could speak directly to him. She went on the phone and told him that she would appreciate being considered. Bullock responded that the Illinois 8-hour workday for women precluded her being considered. Miss Kamberos stated that that law did not

apply to professionals. At that point, according to plaintiff, Bullock "sort of laughed and said 'they wouldn't hire a woman for this job.'"

Miss Kamberos went immediately to the Equal Employment Opportunity Commission where on March 3, 1969 she filed a charge against defendant and the Illinois State Employment Service. She included the latter because Mr. Metallo had not pressed for an interview in her behalf and took no steps to remedy her predicament.

On March 27, 1969, an investigator for the EEOC went to the offices of GTE Automatic. The investigator met with M. A. Edelman, defendant's director of personnel. Miss Kamberos' charge was served upon defendant. There ensued a flurry of activity in which Bullock was called upon to explain why he had refused to consider Miss Kamberos. He replied in a memorandum to his superior D. W. Kirchoff that he had told Metallo "that we [GTE] were looking for a man to fill this particular position. I also indicated at that time that the particular rationale for wanting a male to fill our attorney position [was] A. the Illinois state law concerning overtime as it pertains to women. B. the long hours that might be involved during contract negotiations." (DX 1). Bullock then footnoted the memorandum in reference to the Illinois state law with the statement "this law, however, doesn't apply to exempt female employees. I didn't realize this and consequently haven't relayed this information to others in the Employment Section." (Id.).

The following day, March 28, Edelman prepared a letter to Miss Kamberos in which he said:

> "I wish to apologize for the misunderstanding which recently occurred regarding the Illinois State Employment Service's inquiry into the position of Attorney with our Company. Although the recruiter was correct in indicating that the position in question involved considerable overtime, he was unaware

> that the State 'Eight Hour Day for Women' Law doesn't apply to exempt professional employees.
>
> "We are, in fact, desirous of hiring a qualified Corporate Attorney, male or female. Consequently, I would appreciate your sending us a resume indicating your educational background, work experience and salary requirements. We will be pleased to further explore the opportunity of employment if you meet our position requirements.
>
> "Thank you in advance for your interest in Automatic Electric Company." (DX 2).

Edelman testified that while he did not personally mail the letter to Miss Kamberos, it was prepared in the ordinary channels of business to the end that it would have been mailed. Edelman's secretary who testified by way of deposition identified her stenographic symbol on the letters. She did not recall the letter and was unable to testify that it was mailed.

Miss Kamberos testified that she did not receive the letter. We believe her testimony. She testified that the first time she saw the letter was in 1973 when she asked EEOC to try to conciliate her dispute with defendant. She never received a response to her request for conciliation.

Then on April 4, 1969 Edelman wrote to the EEOC investigator, transmitting a copy of his March 28 letter to Miss Kamberos, and stating inter alia:

> "It is the company's position concerning the Charge of Miss Kamberos that it was caused by the failure of the Personnel Department employee to be aware of a modification in the Illinois statutes which had been adopted by the 1967 Illinois legislature with respect to the hours of work of women employed in a professional capacity." (PX 29).

Miss Kamberos' charge with the EEOC inexcusably pended for over four years. No further investigation was

conducted after the March 27 visit to GTE Automatic. The record causes one to wonder about the efficacy of the EEOC "remedy." In any event on May 7, 1973 the EEOC concluded that reasonable cause existed to believe that defendant had violated Title VII of the Civil Rights Act of 1964. On January 3, 1974, the EEOC issued to plaintiff a right to sue letter and this action followed immediately.[1]

Seldom does one see a more patent case of discrimination against a person because of her sex. Indeed, defendant concedes that Bullock did not interview Miss Kamberos because she was a woman. But defendant asks us to believe that Bullock's refusal was an inadvertent, innocent good faith mistake predicated upon the Illinois Eight Hour Day for Women Law. Edelman sought to augment this defense by his April 4, 1969 letter to the EEOC.

We do not believe either Bullock or Edelman. GTE Automatic employs thousands of people classified as professionals. Bullock had been doing professional recruiting for two or three years. It is incredible that he and Edelman did not know that the Illinois law had been amended two years prior to the Kamberos incident and had removed professional employees from its scope. We think that defendant has used the Illinois Eight Hour Day for Women Law as a subterfuge or cover for a gross act of sex discrimination.

It is clear to us that general counsel McGuire wanted "the right man" to fill the position as his subordinate. He made that very clear in his August, 1968 letters to

---

[1] The history of Miss Kamberos' action here is almost as distressing as her charge to the EEOC. The case was assigned to three different judges of this court before it was reassigned to us in June, 1977. We set the case for trial as promptly as we could consistent with our obligation to try criminal cases expeditiously under the Speedy Trial Act and the rights of other civil litigants who had been awaiting trial.

the deans of the law schools and the Chicago Bar Association. We have no doubt that he "requisitioned" a male for the position and that Bullock's task was to find McGuire a male. In this context we note that McGuire was not called as a witness and his requisition could not be found.

Nor are we impressed with defendant's argument that Miss Kamberos did not "apply" for the position of corporate attorney. The telephone conversation with Bullock constituted an application. And if by chance she did not apply, it was because Bullock refused to permit her to do so. Certainly his conduct cannot "put beyond the reach of equity the most insidious effects of employment discrimination—those that extend to the very hope of self-realization." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 1871 (1977).

Thus, as we stated when we announced our decision from the bench, the only question in this case is that of the appropriate remedy. We start with Section 706(g) of Title VII which authorizes pervasive and complete relief specifically including an order that plaintiff be hired by defendant and an award of back pay. This remedy question involves the consideration of additional facts relating to Miss Kamberos and to the ultimate filling of the corporate attorney position at defendant's Northlake facility.

Following her discriminatory rebuff at the hands of defendant Miss Kamberos persisted in her search for lawyer employment. In August, 1969 she was employed by the Attorney General of Illinois in the Consumer Fraud Division. After a period of time, she was transferred to the Attorney General's uptown office in Chicago. It was located in a high crime neighborhood. The office was burglarized and all of the equipment stolen. The Attorney General requested Miss Kamberos to make evening speaking appearances in the neighborhood. She refused to do so and was terminated in December, 1971. At that time her salary was $14,500.

In May, 1972, she was employed by the State's Attorney of Cook County in the personal property tax and condemnation departments. Following a change in administration as a result of the election of November 7, 1972 she was asked to resign. She declined to do so. She was fired. At that time her salary was $15,000. Following her discharge by the State's Attorney of Cook County, Miss Kamberos filed charges with the Equal Employment Opportunity Commission. Those charges are still pending.

Since her termination by the State's Attorney of Cook County she has not been able to find lawyer employment. She has answered a number of advertisements without success. One is left with the impression that her professional career may be at an end.

In January, 1969, Thomas E. Chilcott was an officer in the United States Air Force. He was a graduate of the University of Illinois College of Law with a B average. As a student he was on the law review and published four articles. His credentials were impressive. While in the service he had done extensive lawyer work. Chilcott had decided to resign from the Air Force. He was acquainted with GTE Automatic through his military service. In January, 1969, he sent resumes to GTE Automatic in New York, RCA and ten Chicago law firms. He had a number of interviews and received a couple of offers from Chicago firms.

As a result of his letter to GTE Automatic in New York, arrangements were made for him to go to New York to be interviewed for employment. In early March, 1969, he was interviewed by the deputy general counsel and vice president and general counsel of GTE Automatic in New York. On March 28, 1969, he was offered employment with GTE Automatic in its New York office at a salary of $18,500 per year. He accepted.

In early April, 1969, he went to New York to look for a home. While there he stopped in the GTE offices. He was told that there was an opening in Northlake,

Illinois. McGuire, the general counsel of the Northlake facility, was either leaving or had left that position. A man named Baisley was being transferred from New York to Northlake to fill the McGuire vacancy. Chilcott was asked if he would like to accompany Baisley as his assistant. Chilcott agreed to do so, and on July 14, 1969 he started at the Northlake facility at a salary of $18,500. Defendant asserts that Chilcott filled the position that Miss Kamberos was interested in.

Plaintiff seeks the customary remedies in a case of this kind: an injunction compelling defendant to employ her as a corporate attorney, back pay, and attorney's fees. Defendant resists all of these remedies. It starts by asserting that Miss Kamberos was not qualified for the corporate attorney position and would not have received it had she been interviewed. That assertion, of course, flies in the face of Bullock's spontaneous reaction on March 3, 1969 that a person of her qualifications was "exactly the background we're looking for." It also ignores Miss Kamberos' extraordinary devotion to obtaining a professional education and pursuing a professional career. She had attained professional stature despite extraordinary adversity. She had practiced as a lawyer in Chicago for five years (albeit forced to engage in secretarial work simultaneously). She had been house counsel to a chemical and physics research laboratory with international interests for five years. She had returned to Chicago and worked with the National Association of Real Estate Boards as a lawyer; then with Allstate Insurance Company; and finally with a small Chicago law firm in which she engaged in the general practice.

In light of all of this defendant cannot be heard to say that she was not qualified for the position and would not have been offered the position had she been granted a non-discriminatory interview. The Act prohibits defendant from first frustrating Miss Kamberos' aspirations to apply and then saying had she been permitted to ap-

ply she would not have qualified. On paper she clearly met defendant's requirements, save for the fact she was not a male. Defendant cannot avoid liability because it refused to place her qualifications up against those of other applicants, if there were any. We are not amiss in noting that general counsel McGuire's recruiting efforts which began in the summer of 1968 had not produced a replacement for DeMarco by March of 1969.

Defendant seeks to place Miss Kamberos in competition with Mr. Chilcott. A comparison of their credentials, says defendant, shows that Chilcott was clearly the superior of the candidates to the end that Miss Kamberos would not have received the job. But Chilcott was not a competitor for the position which Miss Kamberos sought on March 3, 1969. He had earlier applied for and on March 28 had been employed for a position in New York. No one in Northlake had ever heard of Chilcott until McGuire left the Northlake general counsel position and Baisley was transferred from New York to take it. Then in April of 1969, well over a month after defendant's refusal to consider Miss Kamberos, Chilcott was made a corporate attorney at defendant's Northlake facility.

There is, however, no present vacancy in defendant's corporate law department at its Northlake facility. In these circumstances, as plaintiff agrees, we cannot create a job for her. We can however and do enjoin defendant to employ Miss Kamberos as a corporate attorney when the first vacancy in that position occurs at its Northlake facility.

Insofar as back pay is concerned, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975) teaches that it should be denied only under exceptional circumstances. Plaintiff concedes that such an award should be reduced by her interim earnings and that defendant should not be penalized because plaintiff was terminated from her positions with the Attorney General of Illinois and the State's

Attorney of Cook County. In other words, the salary she was receiving in those positions should stand as a continuing credit as if she had remained in the employ of those offices.

Defendant asserts that the base from which any back pay award is computed should be the $10,500 per year Mr. DeMarco was receiving when he resigned from his position with defendant. Plaintiff on the other hand asserts that the base pay should be the $18,500 per year paid to Mr. Chilcott and the increments which Chilcott realized in ensuing years prior to his resignation from defendant in 1975. In reply defendant, taking a stance somewhat at variance with that it has taken on the issue of liability, asserts that plaintiff was never in competition with Chilcott for the position and that Chilcott's salary represents a premium for his academic record and experience with the Air Force.

There is no testimony to support defendant's analysis of Chilcott's salary. Demarco was inexperienced when he took the position with defendant. At the time of his resignation his total experience did not compare with either plaintiff's or Chilcott's. It was defendant who chose to fill the slot with Chilcott at a salary of $18,500. We have concluded that this is the appropriate measure of damages insofar as plaintiff is concerned.

Plaintiff has supplied the following backpay computation which we approve:

BACK PAY COMPUTATION

Year	GTE Earnings Absent Discrimination	C. Kamberos Interim Earnings	Back Pay Due Plaintiff
1969 (10 mos.)	$15,353.00	$ 4,248.75	$11,106.25
1970	20,500.00	13,171.00	7,329.00
1971	23,500.00	13,596.00	9,904.00
1972	23,500.00	15,000.00	8,500.00
1973	26,500.00	15,000.00	11,500.00
1974	28,500.00	15,000.00	13,500.00
1975	31,000.00	15,000.00	16,000.00
1976	31,000.00	15,000.00	16,000.00
1977	31,000.00	15,000.00	16,000.00
1978 (7 mos).	18,081.00	8,750.00	9,331.00
	Total Back Pay Due Plaintiff through July 31, 1978		$119,170.25

Thus, we conclude that plaintiff is entitled to a back pay award through July 31, 1978 in the amount of $119,-170.25 and a judgment will enter in her favor in that amount.

In addition, defendant should be ordered to continue to pay plaintiff the sum of $16,000 per year until such time as it offers plaintiff the position of corporate attorney in accordance with the views hereinbefore stated.

We turn then to the subject of attorney's fees. 42 U.S.C. § 2000e-5(k) provides for an award of reasonable attorney's fees to the prevailing party in litigation of this type. Plaintiff's counsel Peter B. Carey has submitted a detailed statement of time expended on this engagement. We have reviewed his time sheets with care. They are accurate, informative and reasonable. Altogether Mr. Carey devoted 183.5 hours to the representation of plaintiff; one of his associates Marilyn F. Kalata devoted 20 hours to it and another of his associates John C. O'Rourke Jr. devoted 3/4 of an hour to it. Mr. Carey customarily

charges $70 per hour for his time; Mr. O'Rourke $50 an hour and Miss Kalata $45 an hour. Mr. Carey is an able and experienced member of the bar of this court. He has represented plaintiff efficiently and vigorously. At the regular hourly rates charged by he and his associates, his charges would be $13,782.50. He requests $23,000 upon the grounds that his representation of Miss Kamberos was entirely contingent. He points out that a fee of $23,000 represents approximately 25% of the back pay award, which he has successfully sought for plaintiff.

In all of the circumstances of this case, we have concluded that Mr. Carey and his associates should be compensated at a rate 50% in excess of their normal charges. Accordingly, we award plaintiff's attorneys' fees in the amount of $20,000.

Plaintiff is directed to prepare a decree in accord with the foregoing and present it for entry with notice to the defendant.

ENTER:

/s/ Judge Prentice H. Marshall

DATED: August 10, 1978.

Opposition

Office - Supreme Court, U.S.
FILED
OCT 7 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CONSTANCE KAMBEROS,

Petitioner,

v.

GTE AUTOMATIC ELECTRIC, INCORPORATED

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 5, 1981

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit erred in remanding the case to the district court with directions to subtract from the substantial back pay judgment awarded to Petitioner the amount which accrued during the more than four (4) year period that Petitioner, herself an attorney, permitted her charge to lie dormant with the EEOC rather than demanding her right to sue letter in accordance with federal regulations.

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IN THE

Supreme Court of the United States

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GTE AUTOMATIC ELECTRIC, INCORPORATED

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent[1] opposes the Petition for a Writ of Certiorari because the decision below correctly applies established principles to the facts of this case, is consistent with the decisions of this Court and does not conflict with the decisions in other circuits.

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[1] Pursuant to Rule 28.1 of the Supreme Court Rules, Respondent states that it is the wholly-owned subsidiary of General Telephone and Electronics Corporation. Respondent has no subsidiaries other than two (2) wholly-owned subsidiaries. Although General Telephone and Electronics Corporation has many subsidiaries other than Respondent (a list of which Respondent will promptly supply to this Court upon request), Respondent has no ownership interest in any of these subsidiaries.

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes cited by Petitioner, the following statute and federal regulation are involved in this case:

42 U. S. C. § 2000(e)-5(b) (Supp. V. 1975):

> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

29 C. F. R. § 1601.28(a)(1) (1980):

Notice of right to sue: Procedure and authority.

(a) Issuance of notice of right to sue upon request. (1) When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued and the charge to which the request relates is filed against a respondent other than a government, governmental agency or political subdivision, the Commission shall promptly issue such notice as described in § 1C 1.28(e) to parties paaties at any time after the expiration of one hundred eighty (180) days from the date of filing the charge with the Commission, or in the case of a Commissioner charge 180 days after the filing of the charge or 180 days after the expiration of any period of reference under section 706(d) of Title VII as appropriate.

COUNTERSTATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case but adds the following matter omitted therefrom.

In her Petition for Rehearing and Suggestion for Rehearring *En Banc,* Petitioner raised precisely the same issue as that which she now presents to this Court in her Petition for a Writ of Certiorari. After consideration of her petition, a majority of the active members of the Seventh Circuit voted to deny rehearing *en banc,* and all of the judges on the original panel voted to deny rehearing. Only the Chief Judge was noted as voting to grant the petition for rehearing *en banc.*

REASONS FOR DENYING THE WRIT

The opinion of the United States Court of Appeals for the Seventh Circuit is fully consistent with the decisions of this Court which expressly recognize the equitable power of the federal courts to fashion appropriate remedies and to limit backpay in circumstances which, if applied generally, would not

be inconsistent with the statutory purposes of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e *et seq.* (Supp. V 1975) (hereinafter "Title VII"). *See Occidental Life Insurance Company* v. *EEOC*, 432 U. S. 355, 373 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 421 (1975). The Seventh Circuit's opinion is also not in conflict with any decision of any other court of appeals. To the contrary, the Seventh Circuit's ruling follows directly from the opinion in *Lynn* v. *Western Gillette, Inc.*, 564 F. 2d 1282, 1287-1288 (9th Cir. 1977), in which the Ninth Circuit expressly recognized the inherent equitable power of the federal courts to limit backpay even in circumstances in which the plaintiff may have complied with the time limitations imposed by the statutory filing requirements.

ARGUMENT

I.

THE DECISION OF THE SEVENTH CIRCUIT IS FULLY CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT

Petitioner, an attorney with prior experience in discrimination laws, filed her charge in this case with the Equal Employment Opportunity Commission (hereinafter "EEOC") on March 3, 1969. Although authorized pursuant to 29 C. F. R. § 1601.28(a)(1) (1980) to demand her right to sue letter as early as August 30, 1969, Petitioner instead elected to permit her charge to lie dormant with the EEOC. As a result, her complaint was not filed with the district court until January 17, 1974—nearly four and one-half (4½) years after she could have obtained her right-to-sue letter. The Seventh Circuit found it inequitable to permit backpay to accrue against the Respondent during this inordinate period of delay, and remanded the case to the district court with instructions to make an appropriate reduction in the backpay award.

In ruling on this issue, the Seventh Circuit wrote as follows:

> The court did overlook one factor in computing the amount of backpay. Regulations passed pursuant to 42 U. S. C. §§ 2000e *et seq.* provide that an aggrieved party may request a right to sue letter any time after 180 days following the filing of a charge with the EEOC. 29 C. F. R. § 1601.28 (1978). In *Lynn* v. *Western Gillette, Inc.*, 564 F. 2d 1282, 1287 (9th Cir. 1977), the Ninth Circuit stated that the "complainant should not be permitted to prejudice the employer by taking advantage of the [EEOC's] slowness in processing claims, . . . [p]articularly where the aggrieved party has consulted counsel and is aware of this right." In this case Kamberos not only retained counsel but is a lawyer herself. Nevertheless, she permitted her complaint to lie dormant with the EEOC for over four years, despite the fact that EEOC regulations provide for the automatic issuance of the right to sue letter upon

> request of the complainant any time 180 days after the filing of the complaint with the EEOC. Under these circumstances the district court should have subtracted from the end of the backpay period an amount of time equivalent to the time between the expiration of the 180 day period and the date when the right to sue letter was actually received by the plaintiff. On remand the court should subtract the period from February 24, 1974 to July 31, 1978 from the backpay award. *Kamberos* v. *GTE Automatic Electric, Inc.*, 603 F. 2d 598, 603 (7th Cir. 1979) (footnotes omitted).

Contrary to the arguments of Petitioner, the Seventh Circuit's decision to limit backpay under the narrow circumstances of this case is fully consistent with congressional intent as embodied within Title VII and as interpreted by the decisions of this Court. Although "cooperation and voluntary compliance" are the preferred means of settling discrimination claims, *see Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974), Congress also clearly intended that the administrative process which was created to achieve this goal should, as far as practicable, be completed within one hundred and twenty (120) to one hundred and eighty (180) days (four to six months) after the filing of the charge. *See* 42 U. S. C. § 2000e-5(b) and (f)(1) (Supp. V. 1975). There is no indication, or support for the proposition, that Congress created an administrative process as a means to keep stale claims alive indefinitely while backpay continues to accrue;[2] neither is there any statutory history nor sound logic to support the conclusion that Congress thought it a preferable means for settling a Title VII claim to permit that claim to lie dormant in the EEOC for four to five years even when the claimant is, or is represented by, an attorney during this period.

In *Occidental Life Insurance Co.* v. *EEOC*, 432 U. S. 355 (1977), this Court held only that federal law does not impose a

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[2] It should be noted that a respondent company under such circumstances of administrative delay is absolutely powerless under the statute or regulations to advance the case to the courts.

180-day statute of limitation period upon the EEOC's authority to bring suit and that such an action is not governed by any state statute of limitations period. This Court also recognized in *Occidental,* however, that defendants may be prejudiced by the inordinate delay in the filing of a Title VII action even in cases where the statutory filing requirements have been met. The Court stated that in such circumstances the federal courts have the power to deny or limit backpay to prevent this result. *Id.* at 373. Accordingly, the Seventh Circuit's decision in limiting backpay in this case is entirely consistent with, and indeed follows from, this Court's decision in *Occidental.*[3]

Contrary to Petitioner's assertion, this Court made no attempt in *Occidental* to articulate the standard by which a federal court could exercise its discretion in applying the defense of laches or, as in this case, merely limiting an award of backpay. For this guidance federal courts must look to *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 421 (1975). In that case this Court held that a federal court may deny or limit backpay for reasons which, if applied generally, would not be inconsistent with the statutory purposes of Title VII. As discussed below, the Seventh Circuit's backpay limitation in this case is fully consistent with the statutory purposes of Title VII and this Court's decision in *Albemarle.*

Petitioner argues that the Seventh Circuit's limitation of backpay frustrates Title VII's statutory goal of resolving claims through voluntary cooperation and compliance because it "stampedes" plaintiffs into federal court without permitting the

[3] In the normal course of events defendants will almost always be prejudiced by an inordinate delay in the filing of a Title VII action. This result will not only occur from the obvious accrual of backpay, *see Lacy* v. *Chrysler Corporation,* 533 F. 2d 353, 366-367 (8th Cir.) (dissenting opinion), *cert. denied,* 429 U. S. 959 (1976), but also from fading memories and the loss of witnesses through death, retirement or voluntary or involuntary termination. *Boone* v. *Mechanical Specialties Company,* 609 F. 2d 956, 959 (9th Cir. 1979).

administrative process to run its course (P. pp. 6-7; 8-9).[4] This conjecture is completely unfounded. First, the limitation applies only with respect to plaintiffs who are, or who are represented by, attorneys. Thus, it would have no effect upon lay persons who may not be chargeable with knowledge of their rights. Secondly, even individuals within this narrow category of claimants are not required to short-circuit the administrative process. The charge must remain with the EEOC for six (6) months and with applicable state administrative bodies prior to that time. Even after this period, the plaintiff is free to attempt to reach an agreement with the defendant to permit backpay to accrue in exchange for the plaintiff's agreement to delay bringing suit. Alternatively, the plaintiff could file suit and request the court to stay proceedings pending conciliation procedures. *See Occidental,* 432 U. S. at 375-376 (Rehnquist, J., and Burgher, C.J. dissenting).

Thus, it is clear that the Seventh Circuit's rule does not "stampede" Title VII plaintiffs into court as Petitioner argues. It merely denies plaintiffs who are, or who are represented by, attorneys the right unilaterally to delay judicial proceedings and permit backpay to continue to accrue after the expiration of the 180-day period. Under the Seventh Circuit's ruling, before backpay will continue to accrue in such circumstances, defendants will be afforded the protection of having some participation in the decision to extend the accrual period or of being provided with some judicial supervision over the extent of the delay.[5]

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[4] References herein to specific portions of the Petition for Writ of Certiorari to the United States District Court for the Seventh Circuit shall be abbreviated as follows: (P. pp.).

[5] Indeed, it would appear far more likely that a claim would be resolved through "voluntary cooperation and compliance" and short of trial if the parties meet and address the issues promptly, before memories become dulled and backpay mounts. Where the claimant is

(Footnote continued on following page.)

The Seventh Circuit's decision also does not violate the make whole purposes of Title VII's backpay remedy (P. pp. 9-10). Under the court's decision, the plaintiff will receive all backpay lost as a result of any unlawful discrimination. The plaintiff will simply not be entitled to receive the "windfall" backpay which would accrue as a result of the plaintiff's unilateral decision not to request a right to sue letter. Nothing within this Court's decision in *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), requires a different result.

Thus, based on the foregoing facts, arguments and authorities, it is clear that the decision of the Seventh Circuit is fully consistent with the applicable decisions of this Court. Accordingly, Respondent respectfully submits that the Petition for a Writ of Certiorari be denied.

II.

THE DECISION OF THE SEVENTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS ON THE SAME MATTER

As she did in her Petition for Rehearing and Suggestion for Rehearing *En Banc,* Petitioner attempts to demonstrate a conflict between the Seventh Circuit's opinion and those of other courts of appeal by again mischaracterizing the Seventh Circuit's ruling on this issue as an application of the doctrine of laches. Although Petitioner argued in her Petition for Rehearing that the Seventh Circuit had, in fact, granted a laches defense, she is now apparently willing to concede that the application of laches would have had a far different and more severe effect on her remedy than the backpay limitation actually imposed (P. pp. 15). If the Seventh Circuit had found that the doctrine of laches was applicable, Petitioner's claim would have

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(Footnote continued from preceding page.)

or is represented by counsel, there is no need to allow the claim to remain with an administrative commission that is taking no action upon it.

been barred in its entirety, and she would have lost the substantial backpay award to which she remains entitled under the court's decision.

Petitioner attempts to gloss over this very real distinction by coining a new term—"hybrid laches"—and arguing that a federal court has no authority to limit backpay unless the defense of laches is established (P. pp. 15-19). However, no artifice of legal legerdemain can change the very real distinction between the two remedies nor the legal standards which govern their applicability. As discussed above, under *Albemarle* a federal court may limit backpay in circumstances which, if applied generally, would not be inconsistent with the statutory purposes of Title VII. That is precisely what occurred, and all that occurred, in this case. Respondent never argued for the application of laches, and the Seventh Circuit never considered this defense.[6]

Petitioner cites no court of appeals decision with which the Seventh Circuit's opinion is in conflict. Every court of appeals case cited by Petitioner concerning this issue involved the application of laches and, as discussed above, that doctrine was

[6] Respondent, in fact, may have been able to demonstrate that the application of the doctrine laches was appropriate and that Petitioner's claim should have been barred. As conceded by Petitioner, the defense of laches will operate to bar a plaintiff's claim upon a showing of: 1) unreasonable or inexcusable delay; and 2) substantial, material or serious prejudice to the defendant (P. p. 15). *EEOC* v. *Massey-Ferguson, Inc.*, 622 F. 2d 271, 275 (7th Cir. 1980). In *Massey-Ferguson*, the court held that the passage of four (4) years and nine (9) months from the filing of the charge to the filing of the complaint was unreasonable as a matter of law. Here, the same period was four (4) years and ten (10) months. Moreover, under the doctrine of laches the " 'bare fact of delay creates a rebuttable presumption of prejudice.' " *Boone* v. *Mechanical Specialties Company* 609 F. 2d 956, 958 (9th Cir. 1979). However, Respondent never argued for the application of laches, and the Seventh Circuit did not bar Petitioner's claim.

not even considered by the Seventh Circuit in this case. Thus, based on the foregoing, Respondent respectfully submits that the Seventh Circuit's decision is not in conflict with the decision of any other court of appeals on the same matter and, therefore, a Writ of Certiorari should not issue.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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